

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. COMMODITY FUTURES) Docket No. 15 C 02881
TRADING COMMISSION,)
)
Plaintiff,) Chicago, Illinois
) August 31, 2017
v.) 10:43 a.m.
)
KRAFT FOODS GROUP, INC., and)
MONDELEZ GLOBAL, LLC,)
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS - Motion Hearing
BEFORE THE HONORABLE JOHN ROBERT BLAKEY

APPEARANCES:

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1 (In open court.)

2 THE CLERK: 15 C 2881, U.S. Commodity vs. Kraft Food
3 Groups.

4 THE COURT: Good morning, Counsel. Appearances,
5 please. Thank you for your patience. I can't always control
6 how long the call goes.

7 MR. THOMPSON: No problem. Jim Thompson on behalf of
8 Kraft, the defendant and the movant in the motion to compel
9 that's before the Court.

10 MR. HOWELL: Robert Howell on behalf of the CFTC.

11 MR. McCALL: Kevin McCall on behalf of Kraft, not with
12 respect to this motion, though.

13 THE COURT: Okay.

14 MR. NISSEN: Good morning, your Honor. William Nissen
15 on behalf of Archer Daniels Midland.

16 THE COURT: How are you? I've seen the motion and the
17 status report. I appreciate the parties' efforts. There
18 wasn't a lot of agreement, but I can tell there was a lot of
19 work built into it, so I appreciate that.

20 MR. THOMPSON: Yes.

21 THE COURT: Do you want to argue that, or do you want
22 to rely on the papers?

23 MR. THOMPSON: I'd like to add just a little bit to
24 it.

25 THE COURT: Yeah, go ahead.

1 MR. THOMPSON: I don't think it's -- it's necessarily
2 easy to understand the issues around deliveries, which is the
3 focus of Category 3, and some of the e-mail discovery in
4 Category 6. And so what we've asked for is documents relating
5 to all situations over a six-month period when ADM registered
6 certificates for delivery or took delivery of wheat pursuant to
7 futures contracts.

8 Now, we can tell from centralized CFTC records when
9 certificates are registered for delivery and when they're
10 canceled, but we can't tell anything else that happens on them.
11 After the certificate is registered, wheat can get loaded out
12 pursuant to that certificate, the elevator can cancel the
13 certificate, or the merchant who's the counter-party can hold
14 on to the certificate, and we need to know what happens in
15 those.

16 And you also need to understand, your Honor, that of
17 all the futures trades that market participants enter into --
18 elevators like ADM, merchants like Kraft -- the vast majority
19 of those certificates, those futures contracts never get
20 registered for delivery. We're talking about a very small
21 subset here. And the facts relating to those certificates that
22 are registered certificates for delivery are absolutely
23 critical to the case.

24 The CFTC has alleged that when Kraft entered into the
25 December 2011 futures contracts, Kraft necessarily must have

1 known that delivery under those contracts would not occur in
2 Toledo. Delivery in Toledo was what worked best for Kraft.

3 The CFTC has alleged that Kraft must have known that
4 delivery would never take place on those certificates in
5 Toledo. Kraft disagrees with this strenuously. This is why
6 Kraft ran its test purchases under the September 2011 futures
7 contracts.

8 So what's absolutely critical in this case is what
9 wheat deliveries were actually being made on those certificates
10 that parties had registered for delivery on the September 2011,
11 the June 2011 and the December 2011 futures contracts.

12 Now, all of this information is isolated in just a
13 couple-week periods in connection with each of those times. So
14 we're not even -- although the time period covered is six
15 months, all of the activity relating to whether -- when
16 certificates are registered and when delivery actually occurs
17 is concentrated in a two-week period. There's a two-week
18 period in connection with each of those futures contracts.

19 And it's not just in the pleadings in which this issue
20 is central. This has been a central topic in all of the
21 depositions that have taken place of the elevators so far.
22 This has been the subject of CFTC questions. This has been the
23 subject of Kraft questions.

24 The questions have focused on who was standing for
25 delivery, what were the -- what were the impetuses that were

1 driving your decisions on whether to stand for delivery,
2 whether to register certificates for delivery and what to do
3 with those registered certificates in connection with the June,
4 September and December of 2011 futures contracts.

5 And almost all of the discovery, the questioning on
6 this -- I don't want to get into what the e-mails say because
7 they're confidential. But much of the questioning in those
8 depositions has revolved around e-mail discovery that the
9 elevators have produced relating to certificates they
10 registered for delivery, which is why we're seeking the
11 documents that ADM has on certificates registered for delivery
12 and e-mails relating to those limited times when ADM had to
13 make decisions on what to do with certificates they had
14 registered for delivery.

15 This is absolutely information we cannot get
16 elsewhere. We have tried. We can -- we know who the
17 counter-parties are on certificates registered for delivery.
18 We know when they're registered for delivery, but we have no
19 idea what's happened after the certificates get canceled.

20 They can get canceled, as I said, for a number of just
21 different reasons because the wheat's loaded out, because the
22 elevator buys back the certificate, because the merchant let
23 the certificate stand without actually taking delivery, leaves
24 it at the elevator incurring additional storage charges. We
25 have no insight into what happens to those certificates when

1 they're registered for delivery, and that's the million-dollar
2 question in our case.

3 And I've tried to explain this to ADM. I've tried to
4 work with them in any way I can to get this information, but
5 this is information we just have -- we have to have. Where
6 we've gotten it from other elevators, it has not been
7 voluminous. I'm not trying to make this into a huge
8 production. That's the last thing in the world I want.

9 But Kraft does -- this is information that is the
10 heart and soul of Kraft's defense and the CFTC's allegations,
11 which is why we've insisted on getting it from all the other
12 elevators and why all the other elevators have supplied it.

13 Our understanding is, as I've said, that the vast
14 majority of certificates that are -- that -- that parties
15 entered in -- the vast majority of futures contracts that
16 parties enter into are not registered for delivery.

17 Again, in the documents we've seen, we've seen
18 references to a handful of situations in which ADM was a
19 participant in either delivery that was made or delivery that
20 ADM took. But we can't drill down on what happened in those
21 situations without the information from ADM. So your Honor,
22 that's Category 3 and the e-mail discovery that relates to
23 Category 6.

24 Now let me talk just a little about --

25 THE COURT: Let's break it up, if you're talking about

1 Category 3. Are you seeking a more narrow set of documents
2 than in the pleadings, if you say your concern is the contracts
3 that were registered, certified for delivery rather than any
4 futures contract at all?

5 MR. THOMPSON: What --

6 THE COURT: 'Cause what -- my understanding what you
7 were asking for were the weekly reports regarding deliverable
8 and non-deliverable stocks of wheat for the period of time.

9 MR. THOMPSON: Let's make sure we're talking about the
10 same categories, your Honor. Category 3 is limited to exactly
11 what I just discussed, which is the quantity, location and the
12 registration dates for SRW wheat that ADM registered for
13 delivery or took delivery of. So Category 3, we're not talking
14 about all futures contracts. We'll circle back to Category 1.

15 But Category 3 is limited to situations where ADM
16 registered for delivery or took delivery of certificates. So
17 that's the small subset of all futures contracts that ADM or
18 anybody would have entered into.

19 THE COURT: Do you want to address Category 3? Is
20 that information contained in reports that are -- do you think
21 that there's a basis for getting each individual contract or
22 all the underlying data?

23 MR. NISSEN: You're asking me, your Honor?

24 THE COURT: Yeah.

25 MR. NISSEN: Yes. Your Honor, I believe that the

1 commercially available reports will tell Kraft when deliveries
2 were made and when deliveries were taken, and so they should
3 know every -- every delivery that was made or taken from the
4 commercially available sources.

5 THE COURT: Yeah, that's -- they can do that all they
6 want. The question is what ADM has.

7 Do you have weekly reports regarding what he's seeking
8 within that time period?

9 MR. NISSEN: No, your Honor, not weekly -- the weekly
10 reports are what's in their warehouses. And I think counsel is
11 maybe misusing the word "registered." I think registered for
12 delivery are actual stocks that are in the warehouses that can
13 be delivered.

14 And that's what -- based on that, that's what we
15 agreed to give was our weekly reports, and Kraft said, no,
16 that's not what they want. Now, we have agreed to give them
17 all the futures, and that would include deliverable futures out
18 of the Toledo area. And that's what they say is the real crux
19 of their case.

20 So ADM has two facilities in the Toledo area, and
21 we've agreed, as to both of them, to give them the reports on
22 the hedging. And those hedging contracts, to the extent
23 they're delivered upon, that -- you know, that would be the
24 information as well that would be included in that.

25 So what -- what we're opposed to is giving

1 company-wide at all locations outside of Toledo. I think
2 that's really the issue. So we're willing to provide it as to
3 Toledo, which is what the crux of their case is.

4 MR. THOMPSON: Your Honor, if I could.

5 THE COURT: Yeah, go ahead.

6 MR. THOMPSON: The crux of our case when we take cash
7 deliveries, we take them in Toledo. The whole purpose -- the
8 whole point of this issue, this dispute has to do with
9 elevators choosing not to deliver to us in Toledo.

10 The whole point -- the CFTC's argument is, Kraft, you
11 should have known when you entered into the December futures
12 contracts that parties like ADM were never going to deliver to
13 you in Toledo. We wished the whole case were limited to
14 Toledo. That would have been great for us.

15 The problem is deliveries didn't occur in Toledo. The
16 elevators made decisions to make those deliveries all over the
17 place. The futures contracts is a unified, nationwide market
18 based in Chicago. There is no market in Toledo.

19 There's a Toledo region where we can take deliveries.
20 When we make cash purchases, you're right, we do them in
21 Toledo. This is not cash purchases. These are people
22 delivering on futures contracts, and those elevators, those
23 suppliers deciding to make us go to Memphis or Evansville or
24 all the way down the Mississippi River or to Toledo.

25 We can't limit it to Toledo because the

1 counter-parties to those contracts who could have been
2 supplying Kraft with wheat pursuant to the futures contracts
3 didn't limit it to Toledo.

4 THE COURT: With respect to Category 3, what is the
5 form of that discovery that you think is narrowly tailored to
6 your objective?

7 MR. THOMPSON: Let me tell you that, your Honor.
8 There are -- if -- there are two category -- there are two of
9 our categories that address this discovery. The first is
10 records -- individual transaction records for the -- and it is
11 a handful of occasions when ADM actually registered a
12 certificate for delivery, what happened when they did it.

13 The other thing is the e-mail that would relate to
14 discussions within ADM about whether to, where to, why to make
15 delivery --

16 THE COURT: You say -- let me break it out in two
17 things --

18 MR. THOMPSON: Yes.

19 THE COURT: -- because I have concerns about the scope
20 of the e-mail discovery.

21 But when you say records, what type of record are you
22 asking for?

23 MR. THOMPSON: Typically they'll have transaction
24 records. They will -- when they -- when they -- they will show
25 that they have a registered -- a registered certificate for

1 delivery, and they will then have records showing what happened
2 after they registered that certificate for delivery.

3 Everybody who participates in the futures market needs
4 to keep track of exactly what they do to execute on each of
5 these futures contracts, so ADM will necessarily know here's
6 contract No. 117862. We registered it for delivery. Here's
7 what happened to it. They have those records. We don't have
8 them.

9 THE COURT: Do you want to address -- I know I'm
10 drilling down on it, but can you -- do you want to address that
11 records? He's saying that that's not voluminous, those
12 records, and not limited to, for the purposes of our discussion
13 here, to the two warehouses. But if that was corporate-wide,
14 what kind of a burden would that place on ADM?

15 MR. NISSEN: Your Honor, as long as it doesn't drill
16 too deeply into each transaction, I don't -- I don't think it
17 would be hugely significant as long as we're staying out of
18 e-mails and really just looking at the transaction records.

19 I think you could get into Cargill vessels and things
20 like that and barges, which I think are beyond the scope of
21 what they're talking about here. But if it's just made or took
22 delivery and, you know, did they cancel the receipts, did they
23 sell them to someone else, did they load out, I can't say that
24 that would be, you know, hugely burdensome.

25 THE COURT: All right.

1 MR. NISSEN: I think relevance is the bigger issue
2 there.

3 THE COURT: Well, let's break it out. So is there an
4 agreed statement as to how you would formulate or describe that
5 category of documents if it was corporate-wide, if you will,
6 those records? I'm not talking about e-mails. I'm just
7 talking about the records to address his concern.

8 How would you phrase that, Counsel? Is there a way
9 the parties could both agree to phrase that discovery?

10 MR. NISSEN: I think we could.

11 THE COURT: All right. Well, can you do it right now?

12 MR. NISSEN: Oh, can I do it right now?

13 THE COURT: 'Cause now is the time where everyone's in
14 the same room. So you might as well just figure out what the
15 phrase is so we don't have to come back and say, Well, I didn't
16 think that's what he meant by that.

17 MR. NISSEN: Sure. I think it would be sufficient
18 records to show when ADM made or took delivery during this
19 period of time on that SRW wheat. And I think what they want
20 to know is and what was -- what the disposition of those
21 certificates where they took delivery.

22 They don't know. When they make delivery, that's
23 somebody else. If they take delivery, how did they dispose of
24 those certificates?

25 MR. THOMPSON: I mean, we're addressing it also when

1 they make delivery.

2 THE COURT: Okay.

3 MR. THOMPSON: His description --

4 THE COURT: That's --

5 MR. THOMPSON: So long as it includes counter-party
6 information, it would be sufficient for us.

7 THE COURT: Okay. All right. Now, let's talk about
8 the e-mail. I understand what you're looking for in the
9 e-mail, but you're -- the way you've formulated the e-mail
10 request seems to capture more than what you're asking for.

11 Can you address that because I'm concerned about that.

12 MR. THOMPSON: I certainly can. And, your Honor, all
13 I will say is I've tried repeatedly to discuss that with ADM.
14 Every other case I've had where we've done e-mail searches by
15 search terms, it's been an iterative process.

16 Initially when I called counsel for ADM and said, Hey,
17 are you gonna -- can you produce any of this stuff, they said,
18 Can you send me the search terms that have been used with other
19 searches with elevators. I thought this is promising. This is
20 what I usually do.

21 I send you the set of search terms. You write back
22 and say, you know, this term seems too broad, can we limit this
23 one in time? This one has no application to an individual
24 custodian, could we carve it out, and we would have gone on the
25 way and discussed breaking those search terms down and making

1 them precise enough to target exactly what we wanted and
2 eliminate the noise.

3 THE COURT: Well, why don't you try to eliminate the
4 noise on your own? How would you formulate your discovery
5 requests with respect to e-mails in a way that would be
6 narrowly tailored to what you need?

7 MR. THOMPSON: And I try -- and I tried to do that in
8 the e-mail search that I included in the status report, your
9 Honor.

10 THE COURT: Well, I know, but that had a lot of
11 custodians, and there was an issue regarding whether or not
12 some of those custodians were even relevant now. And the
13 search terms went beyond what it appears that you were asking
14 for.

15 So as you stand here and I -- 'cause I read what was
16 in the status report. I read everything. So give it -- take
17 another swing at it in terms of the ESI 'cause the -- you need
18 to have identified custodians and search terms that are not
19 going to capture everything.

20 I mean, you've got -- you've got some pretty broad
21 search terms in there. So think about what you -- what you
22 want 'cause you don't want to have them produce too much
23 because it's going to drive the cost up.

24 MR. THOMPSON: I will do that, your Honor. We will
25 take a stab at that. I do want to note that we didn't make

1 these up in a vacuum. These are the search terms we used --

2 THE COURT: No, I know that.

3 MR. THOMPSON: We used them with another elevator, and
4 they produced something like 450 or 475 responsive documents.

5 THE COURT: Yeah, but, you know, ADM might be in a
6 different situation. They might have, you know, how many fold
7 e-mails in addition to what some other party might have so --

8 MR. THOMPSON: Well, we're now -- we're focused now on
9 one, maybe two custodians, so that seems unlikely.

10 THE COURT: All right.

11 MR. THOMPSON: I'm happy --

12 THE COURT: Okay.

13 MR. THOMPSON: I'm happy to take a stab at
14 narrowing --

15 THE COURT: Well, let's do it right now.

16 MR. THOMPSON: Absolutely we'll do that.

17 THE REPORTER: Wait, one at a time.

18 MR. THOMPSON: I'm sorry.

19 THE COURT: Let's do it right now. What custodians do
20 you think are needed? Which ones?

21 MR. THOMPSON: You have to tell me which two of the
22 three we identified are no longer with you and you no longer
23 have records for.

24 THE COURT: I think you in the status report
25 identified one as being relevant; is that right?

1 MR. NISSEN: Correct. Your Honor, they asked for
2 three, and we determined that two of them have no e-mails. So
3 Gergen is the one of the three.

4 THE COURT: Okay.

5 MR. NISSEN: And I believe that was put in our status
6 report.

7 THE COURT: It was.

8 MR. THOMPSON: Yeah, it was. I just couldn't remember
9 the name.

10 THE COURT: Okay.

11 MR. THOMPSON: I was looking for it, though.

12 THE COURT: So -- I'm sorry, we got to really try to
13 not speak all at the same time, and I'm as guilty of that as
14 everybody else.

15 So the one custodian would be that one individual.
16 Could you state that person's name for the record.

17 MR. THOMPSON: Mark Gergen, G-E-R-G-E-N.

18 THE COURT: Okay.

19 MR. THOMPSON: And that's Mark with a K.

20 THE COURT: And that time frame would be that June of
21 2011 --

22 MR. THOMPSON: June.

23 THE COURT: -- to December 31st, 2011 --

24 MR. THOMPSON: Right.

25 THE COURT: -- correct?

1 MR. THOMPSON: June of 2011 through December of 2011.

2 THE COURT: All right. Look at those search terms and
3 see if you can narrow those to what you're looking for.
4 Because the search terms you've got capture -- I can just look
5 at them and see they're going to capture a lot of irrelevant
6 material.

7 MR. THOMPSON: Okay. Instead of "offer and wheat,"
8 which is a search term, "offer" and "wheat," I recognize that
9 will capture a broad category.

10 THE COURT: "Wheat" is going to capture a lot.

11 MR. THOMPSON: The -- right. And we're trying to use
12 that in conjunction with other terms. Obviously no one wants
13 every e-mail ADM has that relates to wheat. That would be
14 crazy.

15 Given "offer" and "wheat" would be too broad, why
16 don't we limit to where "offer" is within, say, 15 terms of
17 "wheat" to make -- all we're interested in are offers relating
18 to wheat.

19 So instead of "offers" and "wheat," you know, "offers"
20 within 15 of "wheat," narrowing it to making sure that when
21 we're talking about an offer, it's actually an offer for wheat.

22 We don't anticipate and our experience has not been
23 that including the search term "Kraft" leads to a large number
24 of hits. We're just not top of mind in these elevators.

25 MR. NISSEN: All right.

1 MR. THOMPSON: They're not writing e-mails about us
2 all day.

3 THE COURT: Hold on a second.

4 MR. THOMPSON: Yeah.

5 THE COURT: And I apologize for interrupting. What I
6 want to do and put on the record right now is what your best
7 assessment is of a narrowly tailored search term. So --

8 MR. THOMPSON: Yes.

9 THE COURT: -- go ahead and just give those to me, and
10 then we'll discuss them.

11 So you've got "offer" within 15 of "wheat," "Kraft,"
12 and what other search terms?

13 MR. THOMPSON: "Deliver." And I would limit that in
14 the same way we've limited "wheat." Same thing we've done with
15 "offer" and "wheat." We're not interested in every time they
16 talk about delivery. We are interested when they're talking
17 about delivery related to wheat.

18 So instead of having "deliver" exclamation point, it
19 would be "deliver" within 15 of "wheat." Again, all we're
20 interested in is discussions relating to deliveries of wheat,
21 not every time ADM considers the delivery of something.

22 THE COURT: Any other search terms?

23 MR. THOMPSON: I think we could -- we could eliminate
24 "Toledo" as a search term. I mean, again, I'm not interested
25 in all discussions relating to Toledo. If it was --

1 THE COURT: Yeah, that alone will get a bunch of --

2 MR. THOMPSON: Right.

3 THE COURT: -- non-pertinence.

4 MR. THOMPSON: Right.

5 THE COURT: Go ahead.

6 MR. THOMPSON: So strike the term "Toledo."

7 And then "spread" also will be broad. Let's do the
8 same thing that we've done with the others. Not just spread,
9 it's "spread" also within 15 of "wheat." That way, we're
10 limiting it to situations where they're talking -- they're
11 talking about the spread relates to the spread of wheat.

12 "Carry" and "VSR," we don't think are going to
13 generate excess noise, so we would propose leaving those in,
14 striking Toledo.

15 So, your Honor, so I can sum up, what I would propose
16 is a search -- one search in which we would search for the
17 following terms: "Offer" within 15 of "wheat" or "Kraft" or
18 "deliver" root within 15 of "wheat" or "spread" root expander
19 within 15 of "wheat" or "carry" or "VSR."

20 THE COURT: All right. Counsel, that's a lot more
21 narrow than what was previously proposed. What's your position
22 with respect to that e-mail request? For example, running it,
23 seeing how many hits there are and see whether or not there's
24 still a proportionality issue.

25 MR. THOMPSON: And exactly. I would expect if there

1 is -- if one of these terms we don't expect leads to a whole
2 bunch of hits, then we'll figure out a way to narrow it. I
3 don't want the noise either.

4 THE COURT: What's your thought?

5 MR. NISSEN: Could I just clarify, your Honor. 'Cause
6 I thought "carry" and "VSR" were being eliminated, and then at
7 the very tail end --

8 MR. THOMPSON: No.

9 MR. NISSEN: -- it sounds like --

10 MR. THOMPSON: No, I said I don't think they're going
11 to generate noise if we leave them in. So I was proposing
12 leaving them in.

13 MR. NISSEN: Well, your Honor, first of all, when we
14 were here last, counsel had one request. He said "Kraft" and
15 "wheat" and that was it.

16 MR. THOMPSON: Your Honor, and just --

17 THE COURT: Hang on a second. We really have to be
18 disciplined about not speaking --

19 MR. THOMPSON: I'm sorry.

20 THE COURT: -- at the same time.

21 MR. THOMPSON: I'm sorry.

22 THE COURT: So please let --

23 MR. NISSEN: Sorry.

24 THE COURT: Okay. Everyone's got to take turns, okay,
25 please, or the record's not going to be clear.

1 Go ahead, Counsel, finish your thought.

2 MR. NISSEN: Your Honor, when we were here last,
3 counsel for Kraft said one search "Kraft" and "wheat" through
4 these custodians. And we've sent back in our corners to narrow
5 it, and now it's hugely broader than it was before with all
6 these requests even as talked about today.

7 I would say this epitomizes what we've been talking
8 about the entire time. They want to get into ADM's daily
9 business for all these seven months.

10 Offer vers -- within 15 of wheat, that is -- that's
11 their business is offering. And offers can be in the futures
12 market or in the cash market. That's what they do all day
13 long. They bid and offer in the various markets.

14 The word "Kraft," as I understand it, ADM sells Kraft
15 hundreds of products. So to put "Kraft" in there, that -- that
16 would pull in any kind of relationship with Kraft.

17 "Deliver" within 15 of "wheat," that has -- that's not
18 limited to these -- what we just talked about on delivery of
19 futures contracts. That's any kind of delivery. That could be
20 delivery anywhere in the world, any kind of -- any kind of cash
21 delivery, any -- as well as the futures delivery.

22 "Spread" within 15 of "wheat," the spreads are
23 people -- people talk about those all the -- all the time.
24 They talk about them daily because that's one of the economic
25 market measures people look at, what's the spread between this

1 and that.

2 "Carry." Carry, again, that's a very common term
3 because that's -- that's inherent in every grain contract. The
4 carry is a piece. When you have a difference between two
5 months, the carry is the difference in price from let's say
6 this month and three months from now. The difference is
7 typically called the carry because that's -- that's the storage
8 cost and insurance cost and things like that that where you can
9 hold grain.

10 "VSR," I mean, that's -- I have no idea how much that
11 would go, you know, yes or no. That's -- that's an exchange --
12 exchange type of measure that I don't know if it's in there at
13 all or not or how relevant it would be. But I think -- I think
14 basically this search -- and it's not -- counsel says one
15 search. I see 1, 2, 3, 4, 5, 6 searches here, not one search.

16 And as we costed it out, really more on the limited
17 "Kraft" and "wheat" that counsel talked about at our last
18 hearing, it was -- it was well into six figures in terms of our
19 projected cost for doing this.

20 MR. THOMPSON: Your Honor --

21 THE COURT: Do you need to respond to that? Go ahead.

22 MR. THOMPSON: Yeah, I'd like to very much. Just so
23 we're clear, last time when we were discussing Category 5,
24 which is e-mails related to Kraft, I said we can do that search
25 simply by just saying "Kraft" and "wheat."

1 So we were talking about a category that's limited to
2 e-mail searches relating to Kraft. We never proposed that as
3 the only e-mail search we'd do. That makes no sense.

4 I've -- your Honor, all I can tell you -- I haven't
5 seen their documents. I'm not interested in a bunch of junk.
6 We are using search terms that we've used with other elevators.
7 Per your request, I've stood here today and narrowed them as
8 best I can to make them as tight as possible.

9 I would propose we run one search on these on the
10 single custodians we've now been whittled down to and see what
11 we get. And if some of these search terms produce a thousand
12 documents, if carry's in there a thousand times, then we'll
13 revise it and I'll take it out because I'm not interested in a
14 thousand documents that say, you know, "I carried my lunch with
15 me to work today."

16 THE COURT: Your cost estimate is based not on running
17 the search, but reviewing those documents prior to production,
18 correct?

19 MR. NISSEN: Review? Yes. Yes, your Honor.

20 THE COURT: So if there was a set of search terms and
21 we saw how many hits there were, then we would be in a better
22 position to see whether or not the cost estimates are accurate
23 and whether or not Kraft would be willing to bear the payment
24 for any of those costs, right?

25 MR. NISSEN: There's a certain amount of cost just in

1 running those, your Honor.

2 THE COURT: Well, that's what I'm trying to identify.

3 How much of that six figures is plugging in the terms
4 and pushing "enter"?

5 MR. NISSEN: I would --

6 THE COURT: Because normally running e-mail searches
7 doesn't cost a whole lot of money.

8 MR. THOMPSON: No.

9 THE COURT: If any.

10 MR. THOMPSON: Correct.

11 MR. NISSEN: I would say we -- the part of that that
12 would, you know, not include the attorney's fees, probably
13 between 10 and \$20,000.

14 THE COURT: To do the search?

15 MR. THOMPSON: To do the search or do the search and
16 store it and produce it and --

17 MR. NISSEN: You've got -- you've got --

18 MR. THOMPSON: -- send it to them?

19 MR. NISSEN: You do it with a vendor, your Honor.
20 You've got to send it to a vendor. They've got minimum charges
21 you have to pay. They host it. You've got to have that, and
22 then they've got to do the searches.

23 So yes, I would say the estimate just to run the
24 searches is somewhere in the neighborhood of 10 -- neighborhood
25 of 10 to \$20,000.

1 THE COURT: Have you considered whether or not Kraft
2 is willing to bear any of the cost of the production?

3 MR. THOMPSON: To this point, your Honor, we haven't
4 had those discussions because it's been a hard stop on any
5 e-mail discovery.

6 THE COURT: All right. Do you want to do that?
7 'Cause I wanted the parties to be able -- 'cause the fact that
8 there would be no e-mail discovery is probably not the approach
9 the Court would take.

10 But the e-mail discovery that's been proposed seems
11 overbroad, and I'm concerned about potential cost to a third
12 party, a non-party really. And what I want to do is try to
13 find a way that is equitable to both sides.

14 For example, let's say you get the discovery. How are
15 you going to use it in court? If it doesn't have the word
16 "Kraft" in it and you already have these other pieces of
17 discovery, how is that e-mail going to be used at court or in
18 any dispositive motion or a deposition?

19 If it doesn't say "Kraft" in it and you already have
20 the other discovery, I'm trying to figure out what the, you
21 know, "offer," "wheat" e-mails are going to do for you.

22 MR. THOMPSON: We will use --

23 THE COURT: Do you follow my question?

24 MR. THOMPSON: I think I do, your Honor.

25 THE COURT: Okay.

1 MR. THOMPSON: So I'll try and answer it.

2 THE COURT: Okay.

3 MR. THOMPSON: And I'll answer it by giving you
4 examples. So we've taken depositions of other elevators.
5 Those other elevators have had e-mails that have discussed
6 their strategy as they approach considerations of whether to
7 stand for delivery on certificates they've registered.

8 We've taken those depositions of those people, and
9 that testimony we will use to establish what the market
10 conditions were, what others in the market were doing.

11 So were -- can the CFTC establish that it was
12 necessarily uneconomical for Kraft to believe that it might get
13 delivery on its December of 2011 contracts? We will now have
14 evidence from other elevators, either potential counter-parties
15 to Kraft or who were looking to take delivery at exactly the
16 same time under exactly the same contracts and what they did.

17 And we will use that evidence to establish the
18 conditions that Kraft was facing when it was making its
19 decisions about how to handle its futures contracts. And we
20 would propose doing that with ADM just as we've done it with
21 Cargill and the Andersons and CGB and all the others.

22 THE COURT: Do you want to respond to that?

23 MR. NISSEN: Yes, your Honor. I mean, once again,
24 Kraft has shown no -- no relationship of ADM to this -- this is
25 their daily business, your Honor. All we -- grain companies --

1 and they're not elevators. This is 150 plus elevators, and I
2 think it denigrates them to keep calling them an elevator.
3 This is -- this is a grain company that has many, many
4 elevators around the country.

5 But they -- their daily business is to look at the
6 economics of any kind of delivery or purchase of futures
7 contracts in relation to their own physical supplies. And so
8 what Kraft wants to do is get into ADM's personal business
9 here, and they -- they've identified two purchases or sales
10 they said between -- where Kraft purchased twice from ADM.

11 We offered to give them all the documents pertaining
12 to that. They're not interested in that. They want to fish.
13 They're looking for sound bytes that they can say, Oh, somebody
14 said this about the spread or somebody said this about the
15 market.

16 That's what they're looking for. It's a pure fishing
17 expedition, and it's really, when you look at these terms, it's
18 their daily business. That's what people are constantly doing
19 on the phone all day long is looking at the economics of what
20 they're going to do. And that's their business. It's based on
21 their particular situation, and I just don't see that it's
22 relevant to Kraft.

23 MR. THOMPSON: Your Honor, it's centrally relevant.
24 This is a market that works on supply and demand. ADM is
25 supply.

1 We're trying to figure out what the market conditions
2 were, and we can't figure that out without understanding what
3 the primary market participants were doing. We've gotten that
4 information from the other market participants. Now we're
5 seeking it from ADM.

6 THE COURT: Is Kraft willing to post any -- or offer
7 any funds to help defray the cost of the production?

8 MR. THOMPSON: Kraft will do whatever your Honor
9 orders.

10 THE COURT: You don't want to say that on the record.
11 (Laughter.)

12 MR. THOMPSON: We would -- if you direct us --

13 THE COURT: Well, I'm trying --

14 MR. THOMPSON: -- to fund the e-discovery, then we're
15 going to do it. We're not going to say, oh, no, if we have to
16 pay for it, we don't want it. If you direct that we have to
17 fund some or all of the e-mail discovery, then the discovery
18 matters enough to us that we'll do it.

19 THE COURT: What's your response to that, Counsel?

20 MR. NISSEN: Your Honor, well, I would say if the
21 Court's going to rule against us, we would definitely want
22 costs. But we would urge the Court that's not -- that's not
23 the biggest issue, your Honor.

24 The biggest issue is the relevance getting into ADM's
25 personal business information, dragging them into this

1 lawsuit -- and as counsel said, okay, next step, he's already
2 thinking about taking depositions.

3 Once you get e-mails, you say, well, now we can't
4 understand these e-mails unless we can get the witnesses. So
5 all of a sudden, an uninvolved party is dragged into a case
6 that has nothing to do with it because Kraft is fishing for
7 information that it has no idea what it's going to find, no
8 idea what it expects to find.

9 They've identified no specific deliveries that they
10 say moved the market. No specific transactions that they say
11 are relevant to their case. No dealings with ADM that are
12 relevant to their case except for those two transactions which
13 we've agreed to give them.

14 And we think that the Court ought to limit this to non
15 e-mail discovery and limit it to that Toledo area because
16 that's the focus of the case. The whole case, as I read the
17 complaint, is Kraft did what it did in the futures market in
18 order to drive down the cash price in Toledo.

19 That's, I think, the simple main theme of it. And so
20 to the extent ADM's in the Toledo market, it's willing to do
21 this non e-mail discovery out of Toledo and provide them with
22 futures, cash transactions and, you know, any deliveries that
23 related to Toledo.

24 MR. THOMPSON: Your Honor, I don't need to respond.

25 THE COURT: Okay.

1 MR. THOMPSON: I've explained why this is relevant to
2 Kraft and why the issues that have been raised by the CFTC in a
3 lawsuit that Mr. Nissen hasn't been involved in are, in fact,
4 central to the case.

5 THE COURT: Do you need to address orally any other
6 categories?

7 MR. THOMPSON: Very, very briefly, your Honor. We
8 haven't touched on Category 1.

9 THE COURT: Okay.

10 MR. THOMPSON: And in Category 1, ADM has offered to
11 give us hedge reports from Toledo and Ottawa Lake which we
12 asked for as part of Toledo.

13 The problem we -- while we appreciate that offer, your
14 Honor, the problem we have is that the futures market, unlike
15 the cash wheat market, there's -- cash wheat transactions are
16 relevant in Toledo.

17 We're talking in that -- in Category 1 about all
18 futures positions that ADM entered into. When we've asked and
19 gotten this from other elevators, they've been able to give us
20 an electronic report that has this information at the touch of
21 a button because all of this information is stored
22 electronically.

23 The trades are made on the Board of Trade
24 electronically. So everybody else has been able to generate a
25 report. I can't tell you what ADM does or doesn't have. I

1 just -- we're surprised that they can't give us a report of
2 their futures positions relatively easily only because others,
3 similarly situated entities have been able to. And that's what
4 we're looking for.

5 And one more thing, your Honor, that's information we
6 can't get from somewhere else. We've tried.

7 THE COURT: And the hedge reports, I don't know what
8 the form of that actually looks like. Would it contain the,
9 you know, the dates, specific trades, prices, volume?

10 MR. NISSEN: That's my understanding, your Honor.

11 THE COURT: It would?

12 MR. NISSEN: I've not seen it.

13 THE COURT: Okay.

14 MR. NISSEN: But that's my understanding of what it
15 would do. But it would be localized as to those two Toledo
16 warehouses.

17 THE COURT: So your main concern is not the hedge
18 report itself, but whether or not it's Toledo and Ottawa or
19 whether or not it would be corporate-wide, right?

20 MR. THOMPSON: I don't know what the hedge report
21 shows. So yes, my concern is that a limited view of the
22 futures positions they've taken doesn't tell us what we need to
23 know.

24 THE COURT: Okay. Anything else?

25 MR. NISSEN: Yes, your Honor.

1 THE COURT: Yeah.

2 MR. NISSEN: Again, no relevance to the case. I mean,
3 I think in essence, they proved too much by what they're
4 saying. They can have the entire market. That's all
5 commercially available.

6 Why they have to know a single player in the market --
7 and especially the other thing about it is ADM is a hedger. So
8 I would think they might be more interested in speculators who
9 are just looking at the prices in the market. ADM has a
10 physical position. You can't understand what they're doing
11 without knowing their physical position.

12 And so -- and so for Kraft to try to say they have to
13 have this, it's really not very meaningful. Now, again, with
14 Toledo, that's what the Court identified at the end of the last
15 hearing as an area we ought to talk about. That's an area
16 they've said is important to them.

17 That's where the CFTC says they were trying to depress
18 the prices. That's where we're willing to give them, even
19 though we don't really think it's even relevant there. But to
20 resolve this, we're willing to provide the Toledo futures and
21 the Toledo deliveries and the Toledo cash transactions.

22 MR. THOMPSON: Your Honor, I've explained why -- in
23 our motion why we need the entire market and why we've gotten
24 the entire market from others when we're not focused just on
25 cash transactions which are relevant to Toledo.

1 THE COURT: Okay. Anything further on behalf of any
2 party with respect to the motion?

3 MR. THOMPSON: Not from me, your Honor.

4 MR. NISSEN: No, your Honor.

5 THE COURT: All right, great. I'll issue a written
6 order, and I'll do that fairly shortly, but probably by the end
7 of tomorrow.

8 Do we need a next court date in the case generally?
9 It was like yeah, my time. Sorry for the delay.

10 MR. McCALL: Yes, your Honor.

11 THE COURT: What would -- in light of everything else
12 that's going on, what's a meaningful date?

13 MR. McCALL: Well, Mr. -- Mr. Howell and I have had
14 discussions over the last couple days, one about the discovery
15 cutoff. The CFTC called us up and said, Hey, we think we're
16 going to need more time for discovery and we --

17 THE COURT: What's our current cutoff?

18 MR. McCALL: It's September 27th, I believe.

19 THE COURT: Okay.

20 MR. McCALL: And we agree with them, that we need more
21 time. We've been working incredibly hard, I can say last week
22 to the point of personal exhaustion so -- and the CFTC's been
23 working very hard.

24 We've got a lot of depositions yet to take. The CFTC
25 had a proposal that would have taken us into mid January. We

1 think we're very close to them with respect to, you know, what
2 they proposed to us.

3 And so I think that we can probably come up with an
4 agreement and submit it to your Honor as a -- as a proposed
5 order. But that's where we are, and I don't know that we need
6 an additional date perhaps in December. You know, I don't -- I
7 don't know. Rob, do you have a view?

8 MR. NISSEN: No. I mean, our preference would be to
9 move the date and set the date. We propose the end of the year
10 with a couple weeks into January just because of the holidays
11 since we're doing depositions. But I understand they need more
12 time to figure out how much more time they need.

13 MR. McCALL: And we're --

14 THE COURT: Go ahead.

15 MR. McCALL: I know we're going to get there. We're
16 going to get -- we're going to get to a point of agreement as
17 far as what the date is.

18 THE COURT: Our current next court date's
19 September 8th; is that right? Is that still live?

20 MR. McCALL: I -- I don't recall that date off the top
21 of my head, your Honor.

22 MR. NISSEN: I thought it was -- yeah, I thought it
23 was closer to the cutoff.

24 THE COURT: Closer to the cutoff. Why don't we -- why
25 don't we do this. I'll let you know that the -- I'll strike

1 the close of fact discovery of September 27th, and then I'll
2 strike whatever other dates we have.

3 But what if we come in in the middle of October, and
4 the parties can report on where we are. And then we'll see
5 what the assessment of the fact close at that time, and I'll
6 set a new fact close in October -- not in October, but we'll
7 have a hearing, we'll talk about the new one.

8 MR. THOMPSON: That sounds good, your Honor.

9 THE COURT: Does that sound adequate?

10 MR. NISSEN: That sounds good with the CFTC.

11 THE COURT: Gloria, give me a status. We're going to
12 strike whatever dates we have, and we're going to set a status
13 in October and we're going to strike the fact close of 9-27.

14 THE CLERK: Wednesday, October 18th at 9:45.

15 THE COURT: Is that good for the parties for status?

16 MR. McCALL: Yes. We'll make it work.

17 MR. NISSEN: Same.

18 MR. McCALL: Somebody will be here.

19 THE COURT: And rather than just say we need a lot
20 more time, if you could actually itemize, all right, this is
21 what we have left. It's these depositions, it's these
22 individuals, it's this discovery 'cause that's gonna help
23 inform a meaningful date.

24 I'd like to be able to set one and actually have a
25 schedule in place so we can start getting our way to

1 dispositive motions or whatever else we need to do.

2 MR. McCALL: And we've started. We had those
3 discussions. One of the issues we're facing is it's a lot of
4 third parties. And so they're -- we're doing our best to
5 accommodate the third parties' schedules when we set these
6 depositions.

7 THE COURT: Not according to ADM. I'm kidding. I
8 know -- I know full well the size of the case. So don't worry
9 about it. We're going to have a reasonable schedule.

10 All right. Anything else the Court needs to address
11 today?

12 MR. McCALL: No, your Honor.

13 THE COURT: Thank you, Counsel.

14 (Concluded at 11:24 a.m.)

15 * * * * *

16 C E R T I F I C A T E

17 I certify that the foregoing is a correct transcript of the
18 record of proceedings in the above-entitled matter.

19
20 /s/ LISA H. BREITER
21 LISA H. BREITER, CSR, RMR, CRR
22 Official Court Reporter

September 7, 2017

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